U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 25Jun2002

CASE NUMBER: 2001-LHC-1565

OWCP NO.: 07-114787

IN THE MATTER OF

EDDIE CHAPMAN,
Claimant

v.

STEVEDORING SERVICES OF AMERICA,
formerly RYAN WALSH STEVEDORING,
Employer

and

RYAN WALSH STEVEDORING,
Carrier

APPEARANCES:

Marcus J. Poulliard, Esq.
On behalf of Claimant

Chad Stelly, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND AWARDING BENEFITS ON MODIFICATION

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Eddie Chapman (Claimant), against Stevedoring Services of America (Employer) and Ryan Walsh Stevedoring. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on April 26, 2002, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced eleven exhibits, which were admitted, including: Claimant's Petition for Modification and correspondence from Judge Avery; various Department of Labor correspondence and forms; medical records, correspondence, and the deposition of Dr. Kenneth Vogel; a deposition of Dr. Robert A. Steiner taken in unrelated litigation; and a list of Claimant's medications.[1] Employer introduced five exhibits, which were admitted, including: medical reports from Drs. Robert Shackleton, Robert Steiner, and William Johnston; a vocational report by Nancy Favaloro; and the deposition of Dr. William Johnston.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The injury/accident occurred on June 13 and 14, 1989;

2. Claimant was injured in the course and scope of employment and an employer-employee relationship existed at the time of the accident;

3. Employer was advised of the injury on June 15, 1989;

4. A Notice of Controversion was filed on September 20, 1989 and December 11, 1989;

4. An informal conference was held on July 1, 1999;

5. Claimant's average weekly wage at the time of the injury was $507.46;

6. Claimant received temporary total disability wage benefits from June 14, 1989, until January 4, 1993, based on an average weekly wage of $507.46. Claimant received temporary partial disability wage benefits from January 5, 1993, through March 13, 1994, based on a residual wage earning capacity of $160.20 per week. Claimant received temporary total disability wage benefits
from March 14, 1994, through December 20, 1996. Claimant received temporary partial disability wage benefits from December 21, 1996, to present, based on an average weekly

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's Exhibits- CX-__, p.__; Employer Exhibits- EX-__, p.__; Administrative Law Judge Exhibits- ALJX-__, p.___.

wage of $507.46, and a residual wage earning capacity of $160.20 per week. All medical benefits have been paid except for authorization of the lumbar inter-body cage fusion recommended by Dr. Vogel in 1996; and

7. Claimant suffers from a permanent disability.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of injury and date of maximum medical improvement:

> Entitlement to temporary total disability wage benefits from January 5, 1993, to March 14, 1994;
> Entitlement to temporary total disability wage benefits from December 21, 1996, to the present

2. Reasonableness and necessity of medical treatment;

3. Availability of suitable alternative employment; and

4. Interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Claimant, forty-eight years old a the time of the hearing, lives in Avondale, Louisiana. (Tr. 20). In 1979, Claimant began working on the river-front as a hold man, a job that he continued to perform until his workplace accident in 1989. (Tr. 24). As a hold man Claimant unloaded whatever cargo was in the hold - sacks, bags, cooking oil, steel, iron - a position he considered heavy manual labor. (Tr. 26).

Claimant's injury occurred on June 13, 1989, while shoveling sugar in the hold of a vessel. (Tr. 26). Claimant went to move a water barrel that "turned," and the sugar he was standing on gave way causing his back to pop. (Tr. 26). On June 14, 1989, Claimant returned to work and "hit his back under some rails." *Chapman v. Ryan-Walsh Stevedoring Co.*, 92-LHC-3032 (January 19, 1994)(ALJ). On June 28, 1993, Claimant went to a formal hearing before Judge Avery concerning his right to have surgery and his right to wage benefits. (Tr. 26-27). As a result, Claimant proved his entitlement to surgical procedures and temporary total wage benefits from June 14, 1990 to January 5, 1993, followed by temporary partial wage benefits from January 5, 1993 and continuing. *Chapman*, *supra*.

On March 14, 1994, Claimant underwent surgery with Dr. Vogel due to a herniated lumbar disc with lumbar spondylosis, and Dr. Vogel performed a micro-surgical laminectomy at L5-S1 and medical branch neurotomy at L4-5 and L5-S1. (CX 6, p. 6). In preforming the operation Dr. Vogel noted that the central herniated disc was "grossly abnormal." *Id*. On May 13, 1994, Dr. Vogel wrote to Claimant's attorney that after visualizing Claimant's spine in surgery, he did not think that Claimant would have been capable of any employment from June 15, 1990,[2] to the time of the surgery. (CX 8, p. 1). Claimant filed a petition for modification on February 14, 1995, arguing that Judge Avery's determination of Claimant's entitlement to temporary partial wage benefits should be vacated in light of Dr. Vogel's finding and that Claimant should be entitled to temporary total disability from January 5, 1993 and continuing. (CX 1).

Claimant's condition was not greatly improved by Dr. Vogel's first surgery as he had continuing complaints of pain. (CX 7, p. 4). On September 21, 1994, Dr. Shackleton, an orthopedic surgeon, authored a letter to Employer/Carrier after conducting an "independent medical exam." (EX 1, p. 1). Dr. Shackleton opined that Claimant had instability at L5-S1. *Id*. at 2. Most of Claimant's symptoms seemed to indicate that the left nerve root at L5-S1 was irritated. *Id*. On March 14, 1995, Dr. Shackleton reported to Employer that because Dr. Vogel planed to re-operate on Claimant it would be better to perform a fusion to cut down on the chances of suffering from a recurrent disc at the same level and a fusion would stabilize the motion of that segment. *Id*. at 4. On April 3, 1995, Dr. Vogel diagnosed Claimant with recurrent herniated lumbar disc with instability and conducted a micro-surgical discectomy at L5-S1, this time on the left side, followed by a lumbar fusion. (CX 7, p. 3, 5). Dr. Shackleton performed the fusion. (EX 1, p. 5-6).

Claimant's condition did not greatly improve following his second surgery and by July 24, 1995, Claimant could only ambulate two to three blocks. (EX 1, p. 10). Due to an increase in pain symptoms, Dr. Shackleton scheduled epidural injections. *Id*. By August 31, 1995, Claimant was doing better and his fusion was stabilizing. *Id*. at 11. In December 1995, Claimant had increased his activity so that he could walk up to two miles and Dr. Shackleton stated that the fusion was stable with only one degree of motion. *Id*. at 13.

By February 1996, however, Claimant was no longer improving and complained of pain symptoms. (EX 1, p. 15-16). An MRI performed on February 6, 1996, revealed mild narrowing of the disc spaces at L4-5 with a desiccated disc, but the disc was not bulging or herniated and there was no forminal narrowing. *Id*. at 19. At L5-S1 the remaining disc was also desiccated, but there was no evidence of disc herniation. *Id*. Discussing the diagnostic results and Claimant's deteriorating physical condition with Employer, Dr. Shackleton explained that the source of Claimant's pain was likely scar tissue as no other source was indicated on the MRI. *Id*. at 21. While Dr. Shackleton felt that Claimant was honest with his complaints of pain, he felt as if Claimant could resume working at a "strictly light duty" level. *Id*.

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[2] Dr. Vogel assumed that this was the date of Claimant's workplace accident. (CX 5, p. 36).

In March 1996, Dr. Vogel re-examined Claimant and suggested that Claimant see another doctor about the possibility of undergoing a third surgery for a caged fusion due to significant pain and positive neurological findings indicating that Claimants' spine was not stable. (CX 5, p. 8). Due to the passage of time the chances that the inter-body caged fusion would help Claimant's condition was "fifty-fifty." *Id*. at 34. On July 18, 1996, Dr. Shackleton recommended that Claimant speak with Dr. Vogel about the placement of a spinal cord stimulator in an effort to control his pain. (EX 1, p. 22).

Dr. Steiner, an orthopaedic surgeon, examined Claimant on behalf of Employer on December 5, 1996. (EX 2, p. 1). Dr. Steiner did not detect any instability above the fused segment, and concluded that Claimant had degenerative lumbar disc disease. *Id*. at 2-3. Claimant's complaints, and his physical findings indicated that Claimant had nerve root irritation secondary to epidural scarring. *Id*. Accordingly, Dr. Steiner opined that Claimant would not benefit from an anterior fusion since surgery would not help alleviate symptoms due to scarring. *Id*. at 3-4.

On January 9, 1997, Dr. Shackleton noted that Claimant now had five degrees of motion at the L5-S1 level and Dr. Shackleton concurred in Dr. Vogel's recommendation for a caged fusion. (EX 1, p. 23). Claimant's complaints of pain were continuing and the pain was now running into his testicles. *Id*. By October 5, 1999, Claimant indicated his willingness to have a trial run with the spinal cord stimulator, and Dr. Shackleton explained that it may relieve his leg pain, but it would not do anything to relieve his back pain. *Id*. at 25. On March 25, 1997, Dr. Steiner reviewed Dr. Shackleton's reports from January and February 1997, and reiterated his position that Claimant did not have any significant instability to warrant a lumbosacral fusion. *Id*. (EX 2, p. 5). On April 3, 1997, Dr. Steiner recommended against the use of a spinal cord stimulator because in his experience it did not significantly relieve a patient's symptoms. *Id*. at 6.

On March 26, 2001, Claimant was re-examined by Dr. Vogel in relation to lumbrosacral pain, bilateral leg pain, and bilateral inguinal pain. (CX 9, p. 1). On September 4, 2001, Claimant related to Dr. Vogel that he experienced a spontaneous exacerbation of his pain and Dr. Vogel opined that Claimant was still disabled from gainful employment. On January 21, 2002, Dr. Vogel re-evaluated Claimant stating that Claimant remains totally and permanently disabled in lieu of Carrier's refusal to authorize a posterior lumbar inter-body caged fusion. (CX 9, p. 3).

Dr. Johnston, a neurosurgeon, examined Claimant on October 13, 2001, to conduct an independent medical exam on request of the Department of Labor. (EX 3, p. 3). Dr. Johnston stated that given Claimant's current clinical examination and most recent imaging, Claimant had attained maximum medical improvement on December 5, 1996 - the date lumbar stability was documented by Dr. Steiner - some eighteen months following Claimant's last surgical procedure. *Id*. at 4. Dr. Johnston recommended an MRI of the lumbar spine to document spinal cord or nerve root compression, views of the lumbar spine to document spinal instability, an EMG to document neurologic functioning, a functional capacity evaluation, four to six weeks of work rehabilitation, chronic pain management, and a psychological evaluation. *Id*. at 5. Accordingly, unless further diagnostic studies demonstrated a surgically correctable pathology, Dr. Johnston recommended against surgery, and expressed serious doubts that Claimant could ever return to his former

employment. *Id*.

B. Claimant's Testimony

After undergoing a second surgery in 1995, Claimant testified that it did not provide him much relief because he still had back pain running down his legs, into his groin, and radiating down to his toes. (Tr. 28). Faced with the prospect of a third surgery, Claimant testified that he was scared and sought other options first - such as a stimulator, therapy, TENS units, epidural injections and medication - and when those alternative did not provide any meaningful relief, and his symptoms deteriorated to a point where he could not control his urination, Claimant wanted to undergo the third surgery. (Tr. 32).

Claimant testified that, due to his present physical state, he could not return to gainful employment. Specifically, Claimant stated:

> Some days I can hardly move. Some days I'm hurting so bad I have to just lay on the floor or in the bed. I can do something today and I'm hurting but I still can do it, but the next couple of days I can't hardly move. And even with a regular job if I'm on a job today and I might work today, I might work tomorrow, but then the days when I can't work I'm just out of it. . . . [S]ometimes, sir, it will be one day, or I do something and can't do nothing for two or three days
> . . . .
>
> Judge Kennington: During a month, on an average month's time, how many days out of 30 days would you be incapacitated, unable to do any type of work? . . .
>
> The Witness: Last month it was seven days.
> . . . .
>
> Judge Kennington: And during this seven to eight days what are you doing?
>
> The Witness: I'm inside on the floor with heating pads on, being still, until it - - taking the pills until it subsides.

(Tr. 34-36).

On days when Claimant is not incapacitated and lying down he testified that his activities consisted of cooking and doing minor chores around the house. (Tr. 60-61). Claimant did not clean because that required too much bending. (Tr. 60). Claimant also stated that he may wash his car or perform minor yard work. (Tr. 61-62).

Claimant stated that he takes an average of nine or ten pills a day and those are for pain, muscle relaxation, sleeping, and to fight depression. (Tr. 37). Claimant opined that his medications would affect his job performance because they impair his ability to concentrate. (Tr. 37). Also,

Claimant testified that he would be unable to perform the job as a toll booth attendant identified by Nancy Favaloro because he would not be able to lay down when his back started to hurt. Neither would Claimant have the ability to go to the bathroom on a frequent basis, and even when that option is available, Claimant still tends to "mess up" and he always travels with a change of undergarments. (Tr. 38).

Regarding his examination with Dr. Johnston, the independent medical examiner appointed by the Department of Labor, Claimant stated that Dr. Johnston only examined him for ten to fifteen minutes. (Tr. 39). When confronted with Dr. Johnston's assessment that his pain was only psychological in nature Claimant stated:

> It ain't in my head. It's my back, my legs making my head hurt, I never had no depression. I had to take depression pills before I got hurt. My back and leg, yes, it aggravates my head, but its not in my head. I never took no sleeping pills before I got hurt. This here it messes up my head, because it gets me - - when my children are there playing I can't get out there and play with them. And sometimes I try. Then I'm hurting bad.
>
> Or they go somewhere - - if I try to go to church sometimes I'm messing all over myself. I let my wife and them go. My granddaughter had a birthday party. I couldn't do. Yes. It messes with my head. When I'm sitting down there and on the floor and wondering why I can't too much get up and do nothing, yes, it messes with my head, but it ain't my head. It's my back and legs. It's the pain.
>
> Who has had pain long and it don't mess with your head? I don't think nobody. Yes. It messes with my head.

(Tr. 39-40).

Regarding Dr. Vogel's recommendation for a caged fusion, Claimant stated that Dr. Vogel did not tell him that surgery only had a fifty percent chance of improving his condition. (Tr. 55).

Testimony and Vocational Rehabilitation Report of Nancy Favaloro

On January 28, 2002, Ms. Favaloro completed a vocational rehabilitation report after reviewing the medical reports of Drs. Vogel, Steiner, Johnston, Shackleton, Martin, Knight, Levy, and Hoerner, as well as the Decision and Order of Judge Avery and the records from Mercy Baptist Medical Center. (EX 4, p. 1). Ms. Favaloro indicated that she had previously attempted to provide vocational rehabilitation services to Claimant in 1992, and in conducting the labor market survey she concentrated on the time frames of January 1993 through March 1994 and from December 1996 through the present time. *Id*.

Vocational testing in 1992 revealed that Claimant could identify words at an 8.9 grade equivalency, understand what he read on a sixth grade level and could solve mathematical problems

on a 9.4 grade level. (EX 4, p. 2). Claimant was a high school graduate in the early 1970s and his prior work history consisted of a variety of employers on the river-front. *Id*. Ms. Favaloro identified the following jobs as available in Claimant's community on the dates specified and as commensurate with his physical abilities:

Toll Collector	$7.15 per hour	June 1993, November 1996, July 1997, June 1998, January - March 2000, August 2000
	$7.50 per hour	December 2000, March 2001, July 2001, August 2001
Cashier	?	January 1993, April 1993 - David Drive Exxon, Metairie, Louisiana
	$4.75 per hour	June 1997 - A&G Cafeteria
	$5.75-$6.50 per hour	February 1997, June 1997 - Piccadilly Cafeteria
	$5.75-$6.50 per hour	March - May 2000, January 2001, March 2001 - Piccadilly Cafeteria
	$6.00-$6.50 per hour	May 2001, November 2001 - Piccadilly Cafeteria
	$5.50-$6.75 per hour	January 2002 - Allright Parking
	$6.00 per hour	July 2001, November 2001 - Diamond Jubilee Casino
	$5.00 per hour	March 1997, May - June, 1997 - Hilton Riverside Hotel
	$5.15 per hour	September 1997, 1999-2000 - Hilton Riverside Hotel
	$5.50 per hour	August 2000, July 2001, December 2001 - Hilton Riverside Hotel
Monitor Operator	$4.50 per hour	February 1993, April 1993, July 1994, March 1997 - APS
	$5.35 per hour	April 1998, August 1998 - APS
	$6.50 per hour	December 1999, February -March 2000, November 2000 - Certified Security
	$7.75 per hour	January 2001, December 2001 - Certified Security
Dispatcher	$4.25 per hour	July 1993, February 1994, December 1996, July - August 1997 - Moon's Wrecker Service
	$5.15 per hour	September - October 1997 - Moon's Wrecker Service
	$5.50 per hour	January 2002 - Moon's Wrecker Service
	$5.15 per hour	November 1997, January 1998, June - October 1998, December 1998, February 1999 - King Cabs
	$5.50 per hour	July - September 2000, November 2000,

		February 2001, May 2001 - Pop-A-Lock
	$7.00 per hour	January 2002 - Pop-A-Lock
Front Desk Clerk	$5.00 per hour	March 1993, May 1993, November 1993, August 1994 - St. Charles Inn, February 1994 - Hotel De La Poste
Production Positions	$4.25 per hour	February 1994 - Metal Graphics Inc.
	$5.25-$6.25 per hour	December 1997, January 1998, June 1998, September 1999 - Delta Personnel
	$4.75-$5.15 per hour	July 1997, August - September 1997 - Mrs. wheat's Meat Pies
	$6.00 per hour	September - November 1997, 1998-1999 - Larson Co.
	Minimum wage	1993 and continuing - Wemco (Now Closed)
Hand Worker	Minimum wage	February 1999 - January 2002 - Kalencom Corp.
Production Tech.	$7.50 per hour	September 2000 - January 2002 - Alfax Specialties
Security	$4.25-$5.00 per hour	1993 - 1996 - Vinson Guard
	$5.15-$7.00 per hour	1997 - January 2002 - Vinson Guard
	$7.25-$8.00 per hour	February 1995, 1997 - January 2002 - Hilton Hotel
	$6.00-$7.00 per hour	-May June 2001, January 2002 - Royal Sonesta Hotel
	$6.50-$7.00 per hour	June 2000- January 2002 - American Commercial Security Services

(EX 4, p. 2-6).

As part of Claimant's earlier litigation before Judge Avery, Ms. Favaloro identified suitable alternative employment as approved by Claimant's treating physician, Dr. Hoerner and as approved by Judge Avery. (Tr. 69). In June 1996, Dr. Shackleton indicated that Claimant was capable of performing light duty work and Dr. Vogel indicated that Claimant was capable of lifting ten pounds. (Tr. 72). In a letter dated February 1996, Dr. Vogel stated that Claimant could lift, push and pull thirty-five pounds. (Tr. 72). Ms. Favaloro's labor market survey from July of 1996 included such jobs as an unarmed security guard, monitor operator, parking lot cashier and production worker paying between $4.75 and $6.59 per hour. (Tr. 72-73). In December 1996, Dr. Steiner approved the jobs Ms. Favaloro identified, but Dr. Shackleton did not approve, indicating that he did not have the benefit of seeing Claimant recently to make such a determination. (Tr. 74). Ms. Favaloro also stated that all the positions she identified fall within the restrictions set by Dr. Johnston. (Tr. 75).

On cross examination, Ms. Favaloro acknowledged that she did not speak with Dr.

Shackleton after he reached the conclusion that Claimant's fusion had failed. (Tr. 78). Likewise, Ms. Favaloro had not spoken to Dr. Vogel after he recommended a third surgery. (Tr. 78). Ms. Favaloro does not ask potential employers how many people apply for a particular position and does not consider competition for a job a factor in identifying alternative employment. (Tr. 85-86). Assuming Claimant would have to miss up to seven days a month due to pain, Ms. Favaloro stated that Claimant would not have a good chance of retaining any position. (Tr. 88).

D. Exhibits

Medical Records and Deposition of Dr. Kenneth Vogel

On March 14, 1994, Claimant underwent surgery with Dr. Vogel, a neurosurgeon, due to complaints of lumbosacral and bilateral leg pain. (CX 6, p. 7). Dr. Vogel's pre-operative diagnosis was a herniated lumbar disc with lumbar spondylosis and he performed a micro-surgical laminectomy at L5-S1 and medical branch neurotomy at L4-5 and L5-S1. *Id*. at 6. In preforming the operation Dr. Vogel noted that the central herniated disc was "grossly abnormal." *Id*. Dr. Vogel approximated that Claimant would be disabled for three to six months after the operation. *Id*. at 2. Three to six months was chosen because after that time Dr. Vogel liked to re-evaluate his patient to see if they are capable of doing some work with the understanding that fusions normally heal within one year. (CX 5, p. 7). On May 13, 1994, Dr. Vogel wrote to Claimant's attorney that after visualizing Claimant's spine in surgery, he did not think that Claimant would have been capable of any employment from June 15, 1990,[3] to the time of the surgery. (CX 8, p. 1).

On April 3, 1995, Claimant presented to Dr. Vogel again complaining of lumbosacral and left leg pain that had progressively increased since his earlier surgery and which had not been relieved by conservative care. (CX 7, p. 4). Dr. Vogel's impression was recurrent herniated lumbar disc with instability and his plan was to conduct a micro-surgical discectomy at L5-S1, this time on the left side, followed by a lumbar fusion. *Id*. at 5. On April 3, 1995, Dr. Vogel performed that surgery. *Id*. at 3. He estimated that Claimant's approximate disability from the procedure would last one year. *Id*. at 1. In March 1996, Dr. Vogel re-examined Claimant and suggested that Claimant see another doctor for the possibility of undergoing a third surgery for a caged fusion due to significant pain and positive neurological findings that indicated that Claimants' spine was not stable. (CX 5, p. 8). Although a radiologist's report of a MRI, dated February 6, 1996, indicated that Claimant, had no change in his diagnostic data from earlier studies, Dr. Vogel opined that Claimant's symptoms were due to recurring instability because the MRI would not detect any nerve root encroachment and the radiologist did not comment on the stability of the spine. *Id*. at 11-15. If Claimant had pain symptoms from scarring, which Dr. Vogel did not think was the case, Claimant would not require further treatment. *Id*. at 13, 15.

Regarding Claimant's positive straight leg raises, Dr. Vogel stated that following a successful

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[3] Dr. Vogel assumed that this was the date of Claimant's workplace accident. (CX 5, p. 36).

discectomy the test should not be positive. (CX 5, p. 18). While the lumbar fusion that Dr. Shackleton performed should have alleviated much of Claimant's lumbar facet pain, Dr. Vogel related that a failed fusion could occur even when the fusion looks solid. *Id*. at 18-21.

On March 26, 2001, Claimant was re-examined by Dr. Vogel in relation to lumbrosacral pain, bilateral leg pain, and bilateral inguinal pain. (CX 9, p. 1). Dr. Vogel recommended continued conservative care. *Id.* On September 4, 2001, Claimant related to Dr. Vogel that he experienced a spontaneous exacerbation of his pain, but Dr. Vogel only recommended conservative care at a pain clinic, and he opined that Claimant was still disabled for gainful employment. *Id*. at 2. In neither exam did Dr. Vogel detect any atrophy in Claimant's lower extremities, which as a general matter accompanies nerve root damage. (CX 5, p. 22). Atrophy was not a necessary sign of nerve root damage because atrophy usually occurred when more than one nerve root was affected and it may not occur when a single nerve root is damaged. *Id*. Bilateral radicular symptoms could be indicative of damage to a single nerve root on each side. *Id*. at 23.

If Dr. Vogel was authorized to perform a caged fusion, he hoped that the procedure would alleviate eighty to ninety percent of Claimant's pain and allow him to return to gainful employment. (CX 5, p. 25). The caged fusion was different from Dr. Shackleton's fusion because when Dr. Shackleton performed the procedure the percentage of good results was around sixty percent, but with the advent of the titanium cage the success rate improved to ninety-one percent, meaning that ninety-one percent of the patients were able to return to work. *Id*. at 26. Due to the passage of time the chance that the inter-body caged fusion would help Claimant's condition was "fifty-fifty." *Id*. at 34. Regarding the use of a spinal stimulator, Dr. Vogel expressed misgivings about the success rate of that device, but stated that if it worked, "it would be a wonderful way to relieve his pain." *Id*. at 27. Implanting the stimulator is a surgical procedure and it may relieve Claimant's leg pain but would not do anything for his back. *Id*. at 31. Dr. Vogel also agreed with Dr. Johnston that Claimant has chronic pain syndrome, no objective focal clinical signs of acute nerve root compression, that Claimant has nerve root damage, and Dr. Vogel concurred in the need for additional diagnostic testing. *Id*. at 29-30. Dr. Vogel opined that at the time of the deposition on September 14, 2001, Claimant remained totally disabled. *Id*. at 30. This conclusion was reiterated on January 21, 2002, when he stated that Claimant remains totally and permanently disabled in lieu of Carrier's refusal to authorize a posterior lumbar inter-body caged fusion. (CX 9, p. 3). Absent surgery, Claimant reached maximum medical improvement a year after his April 1996 surgery. (CX 5, p. 38-39).

Medical Records of Dr. Shackleton

On September 21, 1994, Dr. Shackleton, an orthopedic surgeon, authored a letter to Employer/Carrier after conducting an "independent medical exam." (EX 1, p. 1). Evaluating Claimant in a physical exam, and reviewing Claimant's medical history, Dr. Shackleton opined that Claimant had instability at L5-S1. *Id*. at 2. Dr. Shackleton was unable to prove this, however, due to Claimant's inability to bend. *Id*. Most of Claimant's symptoms seemed to indicate that the left nerve root at L5-S1 was irritated. *Id*. On March 14, 1995, Dr. Shackleton reported to Employer that

because Dr. Vogel planed to re-operate on Claimant it would be better to perform a fusion to cut down on the chances of suffering from a recurrent disc at the same level and a fusion would stabilize the motion of that segment. *Id*. at 4. Dr. Shackleton performed that fusion himself as part of Dr. Vogel's April 3, 1995 surgery. *Id*. at 5-6.

Claimant's condition did not greatly improve following his fusion, and on July 24, 1995, Claimant could only ambulate two to three blocks, and bending films showed four degrees of motion across the L5-S1 level. (EX 1, p. 10). Due to an increase in pain symptoms, Dr. Shackleton scheduled epidural injections. *Id*. By August 31, 1995, Claimant was doing better and he only had one degree of motion on bending films which was a sign that his fusion was stabilizing. *Id*. at 11. In December 1995, Claimant had increased his activity so that he could walk up to two miles and Dr. Shackleton stated that the fusion was stable with only one degree of motion. *Id*. at 13.

By February 1996, however, Claimant was no longer improving and he complained of pain symptoms. (EX 1, p. 15-16). Between his February and March 1996 examinations, Claimant lost seventeen pounds and he reported that an epidural injection only relieved twenty percent of his pain for three weeks. *Id*. at 18. An MRI performed on February 6, 1996, showed mild narrowing of the disc spaces at L4-5 with a desiccated disc, but the disc was not bulging or herniated and there was no forminal narrowing. *Id*. at 19. At L5-S1 the remaining disc was also desiccated, but there was no evidence of disc herniation. *Id*. Discussing the diagnostic results and Claimant's deteriorating physical condition with Employer, Dr. Shackleton explained that the source of Claimant's pain was likely scar tissue as no other source was indicated on the MRI. *Id*. at 21. While Dr. Shackleton felt that Claimant was honest with his complaints of pain, he felt that Claimant could resume working at a "strictly light duty" level. *Id*. By July 18, 1996, Dr. Shackleton recommended that Claimant speak with Dr. Vogel about the placement of a spinal cord stimulator in an effort to control his pain. *Id*. at 22.

On January 9, 1997, Dr. Shackleton noted that Claimant now had five degrees of motion at the L5-S1 level and Dr. Shackleton concurred in Dr. Vogel's recommendation for a caged fusion. (EX 1, p. 23). Claimant's complaints of pain were continuing and the pain was now running into his testicles. *Id*. On February 27, 1997, Dr. Shackleton noted that Dr. Steiner did not detect any motion across the L5-S1 level, but measuring the same films Dr. Shackleton detected five degrees of motion. *Id*. at 24. By October 5, 1999, Claimant indicated his willingness to have a trial run with the spinal cord stimulator, and Dr. Shackleton explained that it may relieve his leg pain, but would not do anything to relieve his back pain. *Id*. at 25.

Medical Records of Dr. Robert Steiner

Dr. Steiner, an orthopaedic surgeon, examined Claimant on behalf of Employer on December 5, 1996. (EX 2, p. 1). While Dr. Steiner did not detect any positive findings on the right during straight leg raises, five x-ray views of the lumbar spine revealed minimal anterior osteophytic lipping at L4-5 and moderate narrowing at L5-S1. *Id*. at 2. Dr. Steiner did not detect any instability above the fused segment. *Id*. Dr. Steiner concluded that Claimant had degenerative lumbar disc disease.

Id. at 3. Claimant's complaints, and his physical findings, indicated that Claimant had nerve root irritation secondary to epidural scarring. *Id*. Accordingly, Dr. Steiner opined that Claimant would not benefit from an anterior fusion since surgery would not help alleviate symptoms due to scarring. *Id*. at 3-4.

After reviewing Dr. Shackleton's reports from January and February 1997, Dr. Steiner stated that he measured two degrees of motion at the lumbosacral level and the difference with Dr. Shackleton's five degree measurement was insignificant. (EX 2, p. 5). Dr. Steiner reiterated his viewpoint that Claimant did not have any significant instability to warrant a lumbosacral fusion. *Id*. On April 3, 1997, Dr. Steiner recommended against the use of s spinal cord stimulator because in his experience it did not significantly relieve a patient's symptoms. *Id*. at 6.

Medical Records and Deposition of Dr. William J. Johnston

Dr. Johnston, a neurosurgeon, examined Claimant on October 13, 2001, on referral from the Department of Labor, to issue an independent medical exam. (EX 3, p. 3). Dr. Johnston stated, given Claimant's current clinical examination and most recent imaging, Claimant attained maximum medical improvement on December 5, 1996 - the date lumbar stability was documented by Dr. Steiner - some eighteen months following Claimant's last surgical procedure. *Id*. at 4. Dr. Johnston recommended a MRI of the lumbar spine to document spinal cord or nerve root compression, views of the lumbar spine to document spinal instability, an EMG to document neurologic functioning, a functional capacity evaluation, four to six weeks of work rehabilitation, chronic pain management, and a psychological evaluation. *Id*. at 5. Accordingly, unless diagnostic studies demonstrated a surgically correctable pathology, Dr. Johnston recommended against surgery, and expressed serious doubts that Claimant could ever return to his former employment. *Id*.

At his deposition, noticed on April 26, 2002, Dr. Johnston stated that his examination of Claimant appeared non-organic because he could detect no objective focal clinical neurologic signs of spinal cord or nerve root malfunction. (EX 5, p. 11). Dr. Johnston did not have the benefit of the February 1996 films during his examination. *Id*. at 12. Dr. Johnston opined that Claimant had chronic pain syndrome and had the possibility, which he has not had the occasion to verify, of cauda equina syndrome, or involvement of multiple components of the nerve roots within the lumbar spine. *Id*. at 13. Although he would not have recommended surgery in 1996, Claimant may have developed some instability in the interim that would warrant surgical intervention. *Id*. at 14.

Dr. Johnston did not think that Claimant could perform his former job, even if a functional capacity exam indicated that he was capable, because of Claimant's reports of pain. (EX 5, p. 18). Claimant would likely be unsuccessful at anything outside of sedentary or light duty type work. *Id*. at 18-19. A psychological examination was necessary to determine if Claimant was malingering or whether Claimant had psychological impairments as a result of his chronic pain. *Id*. at 22. Dr. Johnston opined, however, that Claimant's subjective complaints of pain were out of proportion with identified organic problems. *Id*. at 23.

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he is entitled to Dr. Vogel's recommended surgery consisting of a titanium inter-body caged fusion under Section 7 of the Act as the recommendation is both reasonable and necessary. Considering the medical evidence, Claimant no longer wishes to undergo surgery for a spinal cord stimulator. Claimant argues that the Court should grant his petition for modification of Judge Avery's January 19, 1994 decision and order based on new evidence, which established that Claimant was totally disabled from employment preceding his March 14, 1994 surgery. Claimant also contends that following his second surgery on April 3, 1995, he continued to be totally disabled from ever being employed until such time as his third surgery is authorized and competed.

Employer argues that Claimant failed to show a change in circumstances sufficient to warrant a modification of Judge Avery's January 19, 1994 decision in light of the uncontradicted testimony of Nancy Favaloro that Claimant was capable of performing employment prior to his March 14, 1994 surgery. After recovering from that surgery, Employer contends that it established suitable alterative employment in January 1996, following Dr. Shackleton's release of Claimant to perform light duty work. Employer also argues that by February 1996, Dr. Vogel released Claimant to do light duty work, Dr. Steiner related Claimant was capable of returning to work in December 1996, and Dr. Johnston opined that Claimant was capable of performing work after his October 2001 exam. Finally, Employer contends that Claimant has failed to show that a third surgery for a lumbar cage fusion is reasonable and necessary.

B. Reasonableness and Necessity of Medical Treatment

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989).

The presumptions of Section 20 apply in a determination of the necessity and the reasonableness of medical treatment. 33 U.S.C. § 920 (2001)(stating that "it shall be presumed in the absence of substantial evidence to the contrary - (a) That the claim comes within the provisions of this chapter. . . ."); *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809, 120 S. Ct. 40, 145 L. Ed. 2d 36 (1999)(finding a difference of opinion among physicians concerning treatment and deciding the issue based on the whole record); *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Under the Administrative Procedures Act, however, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 114 S.

Ct. 2251, 2259, 512 U.S. 267, 281, 129 L. Ed. 2d 221 (1994). The Section 20 presumptions were left untouched by *Greenwich Collieries. Id* at 280. Accordingly, once a claimant has established a *prima facie* case that medical treatment is reasonable and necessary, the employer must produce contrary evidence, and if that evidence is sufficiently substantial, the presumption dissolves and claimant is left with the ultimate burden of persuasion. *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999). Thus, the burden that shifts to the employer is the burden of production only. *Id*. at 817.

B(1) Establishing a Prima Facie Case of Reasonableness and Necessity

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988). Here, Claimant's treating physician Dr. Vogel recommended that Claimant undergo a caged fusion to alleviate nerve root damage in hopes that the procedure would redress eighty to ninety percent of his pain symptoms. (CX 5, p. 25). Dr. Shackleton, also a treating physician, concurred in the need for a caged fusion after he discovered that Claimant has some instability in his spine. (EX 1, p. 23). Thus, two of Claimant's treating physicians recommended a specific procedure for recovery from a workplace accident and Claimant was willing to undertake that treatment, which establishes a *prima facie* case that the treatment is both reasonable and necessary.

B(2) Rebuttal of the Presumption

Once a claimant establishes a *prima facie* case, the employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). The Fifth Circuit uses a substantial evidence test in determining if an employer presented sufficient evidence to overcome a Section 20 presumption. *See Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999)(stating that "[o]nce the presumption in Section [20] is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related.")(citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.* , 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated on the substantial evidence test in the context of causation:

> [T]he employer [is] required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard).

Here, Employer met his burden of presenting substantial evidence that Claimant's proposed treatment is neither reasonable nor necessary. Dr. Steiner reported that Claimant's pain symptoms are due to nerve root irritation secondary to scar tissue and no surgical procedure could correct that problem. (EX 2, p. 3-4). Dr. Johnston, recommended against surgery because he could detect no organic cause, or no objective clinical neurologic signs, of spinal cord nerve root malfunction. (EX 5, p. 11).

B(3) Reasonable and Necessary Based on the Record as a Whole

Once the employer offers sufficient evidence to rebut the Section 20 presumption, the claimant must establish entitlement to the medical procedure based on the record as a whole. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1981). If, based on the record, the evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281. The opinion of a treating physician is entitled to special weight. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 201 n.6(2001); *Cf. Consolidation Coal Co. v. Director, OWCP*, 54 F.3d 434, 438 (7th Cir. 1995)(disparaging a "mechanical determination" favoring a treating physician when the evidence is equally weighted). An ALJ may credit the report of a treating physician over others as long as there is substantial evidence in the record to support such a conclusion. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001).

B(3)(a) Physicians Recommending Surgery

Dr. Vogel recommends a third surgery on the basis that Claimant has significant pain and positive neurological findings indicating that Claimants' spine is not stable. (CX 5, p. 8). Dr. Vogel opined that Claimant's scarring from his earlier two surgeries was normal and opined that Claimant's pain symptoms stem from instability of the spine and not from scarring. *Id*. at 14. Although a radiologist report from February 1996 indicated that there was no change in Claimant's diagnostic data to warrant further intervention, Dr. Vogel stated that the radiologist would not have been able to see nerve root damage or spinal instability. *Id*. at 11-15.

Dr. Vogel testified that his diagnosis of nerve root damage was based on medical probability, taking into account Claimant's subjective reports of pain, the neurological examination, and his failure to heal from his prior surgery as expected. (CX 5, p. 15-16). One of the neurological signs was the fact that Claimant had positive straight leg raises, which should not follow a successful discetomy, and was a sign the nerve root was irritated. *Id*, at 16-18. Another sign of nerve root irritation that Claimant had was lumbar facet pain, or pain on palpation over the joint between the vertebra where movement occurs. *Id*. at 18-19. While the lumbar fusion that Dr. Shackleton performed should have alleviated much of Claimant's lumbar facet pain, Dr. Vogel related that it was possible that a failed fusion could occur even when the fusion looks solid. *Id*. at 18-21. One sign of nerve root damage that was noticeably absent from Dr. Vogel's records was the lack of leg atrophy, but atrophy was not a necessary sign of nerve root damage because atrophy usually occurred when more than one nerve root was affected and it may not occur when a single nerve root is damaged. *Id*. 22. Bilateral radicular symptoms could be indicative of damage to a single nerve root on each side. *Id*. at 23.

A third surgery was necessary, even though it would be Claimant's second fusion, because the advent of the titanium cage fusion since Claimant's 1995 operation improved the percentage of good surgical results from sixty percent to ninety-one percent, meaning that ninety-one percent of the patients were able to return to work. (CX 5, p. 26). Due to the passage of time the chances that the inter-body caged fusion would help Claimant's condition was "fifty-fifty" *Id*. at 34. Dr. Vogel did not enthusiastically embrace the idea of implanting a spinal cord stimulator in Claimant because the placement involved a surgical procedure, the success rate of the device was poor, and it would do little to relieve his back pain. *Id*. at 27, 31.

Dr. Shackleton also recommended surgery because he opined that Claimant had instability in his spine. Following Dr. Shackleton's surgical fusion on April 3, 1995, Claimant initially improved and Dr. Shackleton though the fusion was solid, but by February 1996, Claimant was no longer improving and he complained of pain symptoms. (EX 1, p. 10-13, 15-16). After reviewing the February 1996 MRI of Claimant's lumbar spine and reviewing diagnostic results, Dr. Shackleton originally opined that the source of Claimant's pain was likely scar tissue as no other source was indicated on the MRI. *Id*. at 21. While Dr. Shackleton felt that Claimant was honest with his complaints of pain, he felt as if Claimant could resume working at a "strictly light duty" level. *Id*. By July 18, 1996, Dr. Shackleton recommended that Claimant speak with Dr. Vogel about the placement of a spinal cord stimulator in an effort to control his pain. *Id*. at 22. Dr. Shackleton changed his opinion, however, on January 9, 1997, when he noted that Claimant now had five degrees of motion at the L5-S1 level. *Id*. at 23. This instability could be corrected with a titanium caged fusion. *Id*. Other factors indicating that surgery was appropriate were that Claimant's complaints of pain were continuing and the pain was now running into his testicles. *Id*. As an alternative to the titanium caged fusion, Dr. Shackleton recommended the use of a spinal cord stimulator to try and relieve some of Claimant's leg pains although it would do nothing to relieve the pain in his back. *Id*. at 22, 25.

B(3)(b) Physicians Not Recommending Surgery

Based off his December 5, 1996 examination, Dr. Steiner[4] did not detect any positive findings on the right during straight leg raises, and he viewed five x-ray views of the lumbar spine that revealed minimal anterior osteophytic lipping at L4-5 and moderate narrowing at L5-S1. (EX 2, p. 2). Dr. Steiner did not detect any instability above the fused segment finding instead that Claimant had degenerative lumbar disc disease. *Id*. at 2-3. Claimant's complaints, and his physical findings,

[4] In unrelated litigation, Claimant's attorney cross examined Dr. Steiner in a deposition concerning how much of his practice is related to "independent medical exams" performed on behalf of employers or carriers. (CX 11, p. 23-27). At the deposition, taken December 7, 1998, Dr. Steiner related that he averaged about twenty-two "independent medical examinations" a week over the past five to seven years, and he charged about $500.00 for the average exam. *Id*. at 25-26. Dr. Steiner worked forty-seven weeks out of a year, so such exams constituted over $500,000.00 of his yearly income. *Id*. at 26. In addition to examination charges, Dr. Steiner charged about $500.00 for a deposition and $650.00 for a trial appearance. *Id*. at 26-27.

indicated that Claimant had nerve root irritation secondary to epidural scarring. *Id*. Accordingly, Dr. Steiner opined that Claimant would not benefit from an anterior fusion since surgery would not help alleviate symptoms due to scarring. *Id*. at 3-4. On April 3, 1997, Dr. Steiner recommended against the use of a spinal cord stimulator because in his experience it did not significantly relieve a patient's symptoms. *Id*. at 6.

Dr. Johnston opined that surgery was not appropriate at the present time following his October 13, 2001, examination of Claimant. (EX 3, p. 3). Dr. Johnston recommended a MRI of the lumbar spine to document spinal cord or nerve root compression, views of the lumbar spine to document spinal instability, an EMG to document neurologic functioning. *Id*. at 5. Also, chronic pain management and a psychological evaluation would be helpful in determining whether Claimant's subjective reports of pain are psychological in nature and not organic. *Id*. Accordingly, unless diagnostic studies demonstrated a surgically correctable pathology, Dr. Johnston recommended against surgery. *Id*. Specifically, he could detect no objective focal clinical neurologic signs of spinal cord or nerve root malfunction. (EX 5, p. 11). Nevertheless, Dr. Johnston did opine that Claimant may have cauda equina syndrome, or involvement of multiple components of the nerve roots within the lumbar spine. *Id*. at 13. Although he would not have recommended surgery in 1996, Claimant may have developed some instability in the interim that would warrant surgical intervention. *Id*. at 14. Claimant's subjective complaints of pain were out of proportion with what Dr. Johnston could identify as organic problems. *Id*. at 23.

B(3)(c) Weighing the Medical Evidence

Accordingly, Drs. Vogel and Shackleton recommend the titanium caged fusion based on the findings that Claimant has instability in his spine and suffers from a singe damaged root on either side of his spine. Dr. Johnston determined that he did not have enough diagnostic date to determine if surgery was warranted but he did opine that Claimant likely had nerve root damage. Likewise, Dr. Steiner agrees that Claimant has nerve root damage, but Dr. Steiner opined that is was due solely to scar tissue. Dr. Vogel did not think scar tissue was causing Claimant's problems after viewing the February 1996 MRI because he opined that there was nothing out of the ordinary about Claimant's scarring. Dr. Vogel also stated that the MRI would not document spinal instability or nerve root damage.

I also note that Drs. Vogel and Shackleton document bilateral positive straight leg raises, where as Dr. Steiner found a negative result for Claimant's right side. (CX 9, p. 1; EX 1, p. 26; EX 2, p. 2). Because both Drs. Vogel and Shackleton had occasion to conduct numerous physical exams of Claimant and Dr. Steiner conducted a single examination in December 1996, I give more weight to the positive findings documented by Drs. Vogel and Shackleton. Dr. Shackleton's and Dr. Steiner's interpretation of diagnostic data demonstrating motion across the lumbar spine are in direct conflict. While Dr. Shackleton originally thought that Claimant's lumbar spine was stable with only one degree of motion, Dr. Shackleton also indicated that readings were difficult to obtain because of Claimant's refusal to bend secondary to pain. Dr. Steiner took one reading in December 1996 and opined that the fusion was stable, but reviewing the same data in February 1997, Dr. Shackleton found that it demonstrated five degrees of motion. On reconsideration, Dr Steiner considered the

difference in interpretation minimal. Between the two conflicting opinions I accord more weight to the opinion of Dr. Shackleton because he had the opportunity to obtain a series of readings from 1995 to 1997 after repeated contact with Claimant and he was in a better position to evaluate the degree of movement in the spine considering Claimant's difficulty in being physically compliant for the diagnostic testing. Additionally, I note that even if Claimant's fusion was solid, that does not mean that Claimant did not have nerve root impingement that could be corrected by a third surgery. (CX5, p. 20-21).

No physician has disagreed with Dr. Johnston's position that more diagnostic tests need to be performed. Claimant's most recent diagnostic study is February 1996. Specifically, Dr. Johnston recommended a MRI of the lumbar spine to document spinal cord or nerve root compression, views of the lumbar spine to document spinal instability, and an EMG to document neurologic functioning. Over the past six years Claimant's spinal instability may have increased. I also note that Dr. Johnston's evaluation of Claimant was without the benefit of his 1996 MRI of the lumbar spine and he did not have the benefit of the diagnostic studies that gave rise to the dispute between Drs, Steiner and Shackleton over whether the films showed instability in the lumbar spine. Thus, I find that Dr. Johnston's recommendation for further diagnostic studies is both reasonable and necessary, but I give his recommendation against surgery less weight because Dr. Johnston did not have the benefit of viewing the 1996 MRI and was not shown the views of the lumbar spine that Dr. Shackleton interpreted as showing five degrees of motion warranting surgical intervention.

In *Amos v. Director, OWCP*, 153 F.3d 1051, 1052 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809, 120 S. Ct. 40, 145 L. Ed. 2d 36 (1999), the claimant, Amos, sustained an injury to his right acromion which caused impingement syndrome. Amos' treating physician recommended surgery, but two orthopedists hired by Employer opposed the procedure because it would not likely make Amos asymptomatic, and performing surgery was a judgment call that could make his condition worse. *Id*. at 1052-53. At a formal hearing the ALJ denied the recommended surgery as neither reasonable nor necessary and credited the medical reports of the employer's physicians as more well reasoned. *Id*. at 1053. The Ninth Circuit reversed, reasoning that nothing in the Act required "injured workers to abdicate the right to make their own decisions about their medical care." *Id*. at 1054. Recognizing the employer's right to refuse unreasonable and unnecessary treatment, the Ninth Circuit stated that "when a patient is faces with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Id*. Because neither of employer's orthopedists opined that surgery was unreasonable, but only favored a more conservative approach, and considering the special weight given to the recommendations of a treating physician, the ALJ's denial of the recommended surgery was not based on substantial evidence. *Id*.

Like, *Amos*, I find that it is Claimant, in consultation with his treating physicians, who has the right to chart his own destiny. The weight of the evidence supports the conclusion that Claimant has nerve root irritation in that Claimant has positive straight leg raises, radiating progressive pain, and he failed to recover properly from his earlier surgeries. While it is possible that the nerve root irritation is caused by scar tissue as indicated by Dr. Steiner, I accord his opinion less weight than of Drs. Vogel and Shackleton. As Dr. Vogel agrees that further diagnostic testing, as recommended

by Dr. Johnston, is warranted prior to performing surgery, I find that such diagnostic tests are both reasonable and necessary prior to surgery. Accordingly, should Dr. Johnston's recommended diagnostic studies show an organic pathology treatable by surgery then I find that a third surgery to install a titanium caged fusion is reasonable and necessary.

Should the diagnostic studies show no change from Claimant's condition in 1996, then I still find that a third surgery is reasonable and necessary, giving greater weight to Drs. Vogel and Shackleton than to Drs. Steiner and Johnston due to the fact that Drs. Vogel and Shackleton have the advantage of treating Claimant over a long period of time and due the failure of Dr. Steiner to completely and accurately document positive physical exam findings for straight leg raises. Also supporting the reasonableness and necessity of a third surgery is the fact that Dr. Johnston opined that Claimant had cauda equina syndrome. Furthermore, I credit the opinions of Drs. Vogel and Shackleton over Dr. Johnston because Dr. Johnston was not privy to Claimant's complete medical records.

Should the diagnostic data not favor surgical intervention because no organic pathology can be ascertained, and based on that data Drs. Vogel and Shackleton opine that surgery is not warranted, then I find it is reasonable and necessary for Claimant to undergo psychological treatment and chronic pain management as recommended by Dr. Johnston. Additionally, as Dr. Vogel, Steiner and Shackleton acknowledge that a spinal cord stimulator has a poor track record and considering the fact that Dr. Shackleton only mentioned it as an alternative to surgery, and further considering that Claimant does not want the stimulator, I find that it is both unreasonable and unnecessary.

C. Nature and Extent of Injury and Date of Maximum Medical Improvement

Claimant seeks continuing temporary total disability benefits from June 14, 1989 and continuing. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no

longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

C(1) Nature of Claimant's Injury

On March 14, 1994, Claimant underwent surgery for a herniated lumbar disc with lumbar spondylosis and Dr. Vogel's surgery consisted of a micro-surgical laminectomy at L5-S1 and medical branch neurotomy at L4-5 and L5-S1. (CX 6, p.). Following this surgery, Claimant had instability in the lumbar spine at L5-S1, nerve root irritation, and a herniated disc. (EX 1, p. 1; CX 7, p. 5). These findings, coupled with Claimant's reports of pain, led to a second surgery in April 1995, where Dr. Vogel conducted a micro-surgical discetomy at L5-S1, and Dr. Shackleton performed a fusion. (CX 7, p. 3; EX 1, p. 5-6). Following this surgery Claimant's condition did not improve. After some initial signs that the fusion was stable, in January 1997, Dr. Shackleton detected instability in Claimant's lumbar spine and Dr. Vogel's impression was that Claimant had bilateral nerve root irritation due to spinal instability. (CX 5, p. 8; EX 1, p. 23). Thus, Claimant is now awaiting a third surgery to undergo a titanium cage fusion for which his chances of improving are "fifty-fifty." (CX 5, p. 34).

C(2) Extent of Claimant's Injury

Following Claimant's March 1994 micro-surgical laminectomy at L5-S1 and medical branch neurotomy at L4-5 and L5-S1, Dr. Vogel approximated that Claimant would be disabled for three to six months after the operation. (CX 6, p. 2). Three to six months was chosen because after that time Dr. Vogel liked to re-evaluate his patient to see if they are capable of doing some work with the understanding that fusions normally heal within one year. (CX 5, p. 7). Claimant's condition did not improve, however, and on April 3, 1995, Dr. Vogel performed a second surgical procedure giving Claimant a micro-surgical discectomy at L5-S1 on the left with a lumbar fusion that was performed by Dr. Shackleton. (CX 7, p. 3). He estimated that Claimant's approximate disability from the procedure would last one year. *Id*. at 1. In February 1996, Dr. Vogel set physical restrictions on Claimant, as a goal of what Claimant could hope to attain in the future. (CX 5, p. 24). Shortly thereafter, in March 1996, Dr. Vogel recommended a caged fusion because Claimant's condition still had not improved. *Id*. at 8. According to Dr. Vogel, Claimant is currently disabled for any gainful employment in lieu of the denial for his recommendation of a inter-body caged fusion. (CX 9, p.3).

According to Dr. Shackleton, Claimant was capable of performing "strictly light duty" work in June of 1996, despite the fact that Claimant was honest in his complaints of pain, because there was a poor correlation between Claimant's objective findings and his pain. (EX 1, p. 21). During this time, however, Dr. Shackleton was under the impression that Claimant's fusion was stable and that Claimant was not in need of further surgery. The record does not contain a statement by Dr. Shackleton concerning the extent of Claimant's injuries after he documented five degrees of spinal instability in January 1997, and concurred in Dr. Vogel's recommendation for an inter-body titanium caged fusion . *Id*. at 23.

Dr. Steiner only related that Claimant was not in need of further surgery and he did not address the extent of Claimant's injuries. (EX 2). In December 1996, however, Dr. Steiner approved sedentary to light jobs identified by Ms. Favaloro as suitable for Claimant. (Tr. 74). Dr. Johnston stated on October 13, 2001, that given Claimant's current clinical examination and most recent imaging, Claimant attained maximum medical improvement on December 5, 1996 - the date lumbar stability was documented by Dr. Steiner - some eighteen months following Claimant's last surgical procedure. (EX 3, p. 4). In his deposition on April 26, 2002, Dr. Johnston did not think that Claimant could perform his former job, even if a functional capacity exam indicated that he was capable, because of Claimant's reports of pain. (EX 5, p. 18). Claimant would likely be unsuccessful at anything outside of sedentary or light duty type work. *Id*. at 18-19.

Claimant testified that following his second surgery he did not feel as if he could return to gainful employment stating:

> Some days I can hardly move. Some days I'm hurting so bad I have to just lay on the floor or in the bed. I can do something today and I'm hurting but I still can do it, but the next couple of days I can't hardly move. And even with a regular job if I'm on a job today and I might work today, I might work tomorrow, but then the days when I can't work I'm just out of it. . . . [S]ometimes, sir, it will be one day, or I do something and can't do nothing for two or three days
> . . . .
>
> Judge Kennington: During a month, on an average month's time, how many days out of 30 days would you be incapacitated, unable to do any type of work? . . .
>
> The Witness: Last month it was seven days.
> . . . .
>
> Judge Kennington: And during this seven to eight days what are you doing?
>
> The Witness: I'm inside on the floor with heating pads on, being still, until it - - taking the pills until it subsides.

(Tr. 34-36).

Dr. Shackleton stated that Claimant was "honest" in his reports of pain. (EX 1, p. 21). Only Dr. Johnston stated that Claimant's subjective reports of pain were out of proportion to identifiable organic problems and only Dr. Johnston raised the possibility of malingering or psychological impairments. (EX 5, p. 22-23). The possibility that the pain was all in his head was vigorously defended by Claimant at the hearing. (Tr. 39-40). Apart from the statement by Dr. Johnston, who only saw Claimant for about fifteen minutes, Employer has not attacked the credibility of Claimant. (Tr. 39). Observing his demeanor at trial
and considering the fact that Claimant has already undergone two surgeries, I find Claimant's reports

of pain are credible.

Weighing all the evidence on the extent of Claimant's injuries, I credit the opinion of Dr. Vogel over any other physician of record. Although Dr. Shackleton opined that Claimant was capable of light duty work in June 1996, he was under the impression that Claimant had a solid fusion and was not in need of further surgery. In December 1996, Dr. Steiner interpreted views of Claimant's lumbar spine and opined that Claimant's fusion was stable. Relying on the report of Dr. Steiner, Dr. Johnston used this date as the date Claimant reached maximum medical improvement, without having the benefit of interpreting the films himself. After Dr. Shackleton discovered that Claimant had spinal instability, based on the same films reviewed by Dr. Steiner, he never issued a statement on the extent of Claimant's injuries. As discussed *supra*, I find that the weight of the evidence favors a conclusion that Claimant does have spinal instability, making Dr. Steiner and Dr. Johnston's statements concerning the extent of Claimant's injury less persuasive as work restrictions are likely different on one with an unstable spine as opposed to a stable one. In February 1996, less than a year from his second surgery, Dr. Vogel opined that Claimant would be able to perform some work in the future, but his goal was altered soon thereafter when Dr. Vogel recommended a third surgery.

Thus, Dr. Vogel never released Claimant to return to any employment, and Dr. Shackleton did not related the extent of Claimant's injuries after changing his position in January 1997, to state that Claimant has lumbar instability, essentially agreeing with Dr. Vogel's March 1996 determination. Drs. Steiner and Johnston base the extent of Claimant's injuries on the premise that Claimant's lumbar spine is stable entitling their opinions to less weight. Claimant provided credible testimony that, due to his subjective complaints of pain, he is incapable of work. Therefore, I find that the extent of Claimant's injuries is such that he has not reached maximum medical improvement and thus is temporarily totally disabled until such time as he can recover from his third surgery.[5]

D. Modification

Modification is available to litigants because the purpose of the Act is to render justice. *Finch v. New Port News Shipbuilding and Dry Dock Co.*, 22 BRBS 196 (1989). When re-opening a decision, however, the ALJ must "balance the need to render justice against the need for finality in decision making." *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982). A party may request modification only when there is a change in conditions or a mistake in a determination of fact. 33 U.S.C. § 922 (2001). An ALJ is given wide discretion to modify a

[5] Even if I were to find that the extent of Climant's physical restrictions as set by his physicians allowed him to return to work, Claimant would be unemployable because I credit his subjective complaints of pain and vocational counselor Favaloro stated that Claimant would not have a good chance of retaining any employment if he had to miss up to seven days a month due to pain. (Tr. 88). *See* Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job and finding his totally disabled based off his credible subjective complaints).

compensation order. *O'Keefe v. Aerojet -General Shipyards*, 404 U.S. 254 (1971).

In his January 19, 1994 Decision and Order, Judge Avery determined that Claimant was capable of sedentary and light work, as approved by his treating physician Dr. Hoerner, on January 5, 1993, until such time as he underwent surgery. *Chapman v. Ryan Walsh Stevedoring Co.*, 92-LHC-3032 (Jan. 19, 1994) (slip op. at 11). Judge Avery credited the opinion of Dr. Hoerner over the other physicians of record in large part because Dr. Hoerner had the opportunity to examine Claimant on many occasions over a period of several years. *Id*. at 13. Dr. Hoerner kept Claimant off work beginning in 1989 due to a bulging disc and his recommendation for returning Claimant to work in January 1993 was not based on any ascertainable change in condition from 1989 to 1993.

Subsequently, on March 14, 1994, Claimant underwent surgery with Dr. Vogel for a herniated lumbar disc with lumbar spondylosis and Dr. Vogel performed a micro-surgical laminectomy at L5-S1 and medical branch neurotomy at L4-5 and L5-S1. (CX 6, p. 6). In preforming the operation Dr. Vogel noted that the central herniated disc was "grossly abnormal." *Id*. On May 13, 1994, Dr. Vogel wrote to Claimant's attorney that after visualizing Claimant's spine in surgery, he did not think that Claimant would have been capable of any employment from June 15, 1990[6] to the time of the surgery. (CX 8, p. 1).

Accordingly, Dr. Vogel stated that Claimant was incapable of working when Dr. Hoerner made his recommendation that Claimant was able to work on January 5, 1993. In Judge Avery's Decision and Order he stated that, Dr. Vogel, also a treating physician who had examined Claimant since 1990, refused to issue an opinion on the extent of Claimant's disability absent surgical intervention. *Chapman*, 92-LHC-3032 at 9. Also, there is no evidence that Dr. Hoerner was aware that Claimant's herniated disc was "grossly abnormal." Indeed, Judge Avery based his determination of suitable alternative employment on the fact that Dr. Hoerner stated on January 5, 1993 that if Claimant elected not to undergo surgery then he could work sedentary to light jobs. *Id*. at 14. Considering the new evidence, Judge Avery's determination that Dr. Hoerner's opinion was entitled to more weight than other physicians who had offered an opinion regarding the extent of Claimant's injuries, and Dr. Vogel's recommendation that Claimant was incapable of returning to work based off his subsequent findings when he visualized the herniated disc, I find that Claimant is entitled to modification. Specifically, had Dr. Hoerner known of the extent of Claimant's bulging disc, he would not have recommended that Claimant' was capable of returning to work prior to his surgery. I also note that Dr. Vogel, also one of Clamant's treating physicians, expressly refused to address the issue of whether Claimant could return to work prior to surgery being authorized. As Dr. Vogel was also a treating physician with continued contacts with Claimant, he would be entitled to special weight under Judge Avery's reasoning for crediting Dr. Hoerner. Accordingly, Claimant is entitled to continuing temporary total disability covering the period from January 5, 1993 to March 14, 1994, the day Claimant underwent surgery.

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[6] Dr. Vogel assumed that this was the date of Claimant's workplace accident. (CX 5, p. 36).

F. Conclusion

Claimant established by a preponderance of the evidence that a third surgery to undergo a lumbar inter-body fusion with a titanium cage is reasonable and necessary under Section 7 of the Act. Claimant is entitled to continuing temporary total disability benefits because I credit the statements of his treating physician, Dr. Vogel, that Claimant is totally disabled in lieu of Employer/Carrier's refusal to authorize Claimant's third surgery. Similarly, I find that Claimant made a credible witness and his subjective reports of pain collaborates Dr. Vogel's finding that Claimant is temporarily totally disabled. Claimant also proved his entitlement to modification based on new evidence not available at the prior hearing because had Dr. Hoerner (who was credited above all other physicians by Judge Avery) known of the nature and extent of Claimant's "grossly abnormal" disc, then he would not likely have stated that Claimant was capable of work after January 5, 1993.

G. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

H. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act from March 14, 1994 and continuing , based on an average weekly wage of $507.46, and a corresponding compensation rate of $338.31.

2. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act from January 5, 1993 to March 14, 1994, based on an average weekly wage of $507.46, and a corresponding compensation rate of $338.31.

3. Employer shall be entitled to a credit for all wages paid to Claimant after June 13, 1989.

4. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act, including a third surgery to undergo an lumbar inter-body caged fusion with a titanum cage.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge